

VICTOR CHAM & ANOR**A****v.****LOH BEE TUAN**

COURT OF APPEAL, PUTRAJAYA
ABDUL KADIR SULAIMAN JCA
ARIFIN ZAKARIA JCA
TENGKU BAHARUDIN SHAH JCA
[CIVIL APPEAL NO. S-02-468-2002]
17 JULY 2006

B**C**

CONTRACT: *Misrepresentation - Fraudulent misrepresentation - Liability - Company falsely misrepresented that property was free from encumbrances - Property later foreclosed - Whether director liable for acts of company - Whether director authorised commission of fraudulent misrepresentation*

D

TORT: *Deceit - Fraudulent misrepresentation - Liability - Company falsely misrepresented that property was free from encumbrances - Property later foreclosed - Whether director liable for acts of company - Whether director authorised commission of fraudulent misrepresentation*

E

COMPANY LAW: *Separate legal entity - Lifting the veil of incorporation - Company falsely misrepresented that property was free from encumbrances - Property later foreclosed - Whether director liable for acts of company - Whether director authorised commission of fraudulent misrepresentation*

F

CONTRACT: *Retainer - Implied retainer - Sale and purchase of property - No evidence in writing to support retainer between parties - Whether retainer implied from conduct of parties*

G

CONTRACT: *Retainer - Solicitor-client - Sale and purchase of property - Solicitor failed to make proper searches for encumbrances and redemption of relevant charges on title to property - Whether solicitor liable*

H

TORT: *Negligence - Duty of care - Solicitor-client - Solicitor failed to make proper searches for encumbrances and redemption of relevant charges on title to property - Whether solicitor liable*

The respondent herein purchased the ground floor of a property ('the subject property') from a company called Shing Yin Construction (Kota Kinabalu) Sdn Bhd. The 1st appellant was the

I

- A registered shareholder, director and company secretary of the said company. At the time of the sale transaction, no subsidiary title was issued in respect of the subject property. The respondent obtained a loan of RM102,000 from a credit company to finance the purchase and a loan agreement was executed to that effect.
- B The sale and purchase agreement ('SPA'), the loan agreement and the memorandum of charge were prepared and executed by the 2nd appellant legal firm. The respondent was given possession of the subject property on the date of the execution of the SPA.
- C The subject property was erected on a piece of land called Country Lease No 215328055. The said land was, in fact, charged to Sabah Bank Berhad under six memoranda of charges duly registered with the Land Office on various dates, both before and after the execution of the SPA. The said land including the
- D subject property was subsequently foreclosed by Sabah Bank Berhad and was sold to one Datin Rupiah. The respondent brought an action against the appellants on the grounds of fraudulent misrepresentation. She claimed that cl. 9 of the SPA stipulated that the subject property was free from encumbrances.
- E Her claim for the sum of RM208,587 included the purchase price of the subject property and damages. The learned judge allowed the respondent's claim. Hence, the appellants' appeal.

Held (dismissing the appeal on liability but allowing partial appeal on quantum of damages)

- F **Per Gopal Sri Ram JCA delivering the judgment of the court:**

- (1) The 1st appellant signed the SPA in his capacity as secretary and director of the company. His claim that he did not read the SPA before putting his signature to it could not be accepted. The evidence showed that the fraudulent misrepresentation could not have found its way into the SPA without the approval of the 1st appellant. (para 16)
- G
- H (2) By virtue of cl. 6 of the SPA the respondent was justified to believe that the 2nd appellant was in fact acting as her solicitor. Although there was no evidence in writing to support a retainer between the respondent and the 2nd appellant, a retainer could be implied from the conduct of the parties.
- I (para 21)

- (3) The 2nd appellant did not explain to the respondent that he was only acting as solicitor for the company and the end financier. The 2nd appellant further failed to inform the respondent that, contrary to what was stated in the SPA, the subject property was in fact encumbered with 5 charges. Given that the 2nd appellant was acting as solicitor for both the company and the end financier on one hand and the purchaser on the other, the standard of care required of the 2nd appellant was indeed high. The learned judge was right in finding that the 2nd appellant breached his duty as solicitor for the respondent under the implied retainer. (paras 26 & 27)
- (4) The 2nd appellant in failing to secure the redemption agreement on behalf of the end financier exposed the respondent to losing the subject property upon foreclosure. The evidence showed that there was sufficient proximity between the 2nd appellant and the respondent so as to render the 2nd appellant liable to the respondent for his omission to take the necessary measures to secure the redemption agreement from the chargee. The decision of the learned judge on the issue of liability as against the 2nd appellant was upheld. (paras 29 & 30)
- (5) No documentary evidence was tendered in support of items 3 and 5, *ie*, legal fees and disbursements for lodging and renewal of caveat and premium paid for insurance in respect of the subject property. Therefore, the award under those items could not stand. With regard to item 4, *ie*, interest incurred in respect of the loan from the credit company, taking into account the fact that the respondent had occupied the subject property rent free during the relevant period, that claim should be rightly set off against the said benefit. (para 32)

[Damages reduced from RM208,587 to RM172,673.]

Bahasa Malaysia translation of headnotes

Responden di sini telah membeli tingkat bawah sebuah bangunan ('hartanah tersebut') dari syarikat yang bernama Shing Yin Construction (Kota Kinabalu) Sdn Bhd. Perayu pertama adalah pemegang saham berdaftar, pengarah dan setiausaha syarikat tersebut. Semasa transaksi jualan, tiada hakmilik subsidiari dikeluarkan berkaitan hartanah tersebut. Apapun, bagi membiayai pembelian, responden memperoleh pinjaman sebanyak RM102,000

- A dari syarikat peminjam dan telah memeterai satu perjanjian pinjaman mengenainya. Berikutnya, perjanjian jual beli ('SPA'), perjanjian pinjaman dan memorandum gadaian telah disedia dan didaftarkan oleh firma guaman perayu kedua. Tidak dinafikan bahawa semasa SPA dimeterai milikan hartanah tersebut telah diberi kepada responden.

- B Hartanah tersebut didirikan di atas tanah yang dikenali sebagai Country Lease No. 215328055. Sementara tanah tersebut pula telah digadai kepada Sabah Bank Berhad di bawah enam
- C memorandum gadaian yang didaftar di Pejabat Tanah pada tarikh-tarikh yang berbeza, sebelum mahupun selepas pemeteraian SPA. Tanah tersebut, bersekali dengan hartanah tersebut, kemudian telah dihalang-tebus oleh Sabah Bank Berhad dan dijual kepada seorang Datin Rupiah. Responden mendakwa berlaku salah-nyata
- D fraud dan atas alasan itu telah memulakan tindakan terhadap perayu-perayu. Menurut responden, fasal 9 SPA memperuntukkan bahawa hartanah tersebut adalah bebas dari sekatan-sekatan. Tuntutan responden untuk jumlah RM208,587 adalah termasuk ganti rugi dan harga belian hartanah tersebut. Yang arif hakim telah
- E membenarkan tuntutan responden dan perayu-perayu merayu.

Diputuskan (menolak rayuan berkaitan liabiliti tetapi membenarkan rayuan sebahagiannya atas kuantum ganti rugi) Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

- F
- (1) Perayu pertama menandatangani SPA dalam kapasitinya sebagai setiausaha dan pengarah syarikat. Dakwaannya bahawa beliau tidak membaca SPA sebelum menandatangani tidak boleh diterima. Keterangan menunjukkan bahawa, tanpa
- G keizinan perayu pertama, tidak mungkin salah-nyata fraud akan menyerap masuk ke dalam SPA.
- (2) Berdasarkan fasal. 6 SPA, adalah wajar bagi responden mempercayai bahawa perayu kedua sebenarnya bertindak
- H sebagai peguamcara beliau. Walaupun tidak terdapat apa-apa warkah bertulis untuk menyokong kewujudan retainer di antara responden dan perayu kedua, andaian kewujudan retainer boleh dibuat melalui tingkah laku pihak-pihak.
- (3) Perayu kedua tidak menjelaskan kepada responden bahawa beliau hanya bertindak sebagai peguamcara syarikat dan peminjam. Perayu kedua juga gagal memberitahu responden bahawa, bertentangan dengan apa yang dinyatakan di dalam
- I

SPA, terdapat 5 sekatan gadaian terhadap hartanah tersebut. Mengambil kira bahawa perayu kedua bertindak sebagai peguamcara bagi kedua-dua syarikat dan peminjam di satu pihak dan pembeli di pihak yang lain, tahap berhati-hati yang diperlukan darinya adalah tinggi. Yang arif hakim betul apabila mendapati bahawa perayu kedua telah memungkirkan tanggungjawabnya sebagai peguamcara responden di bawah retainer yang dianggapkan.

A

B

C

D

E

F

G

(4) Kegagalan perayu kedua menyediakan perjanjian penebusan di pihak peminjam telah mendedahkan responden kepada kehilangan hartanah tersebut semasa halang-tebus. Keterangan menunjukkan bahawa wujud pertalian yang mencukupi di antara perayu kedua dan responden sekaligus menyebabkan perayu kedua bertanggungjawab kepada responden atas kegagalannya mengambil langkah-langkah perlu untuk mendapatkan perjanjian penebusan dari pemegang gadaian. Keputusan yang arif hakim atas isu liabiliti terhadap perayu kedua adalah disahkan.

(5) Tiada keterangan dokumentari dikemukakan bagi menyokong item-item 3 and 5 mengenai fee guaman, bayaran pemfailan dan pembaharuan kaveat serta premium insurans yang dibayar berkaitan hartanah tersebut. Oleh itu, award di bawah item-item ini tidak boleh dibenarkan. Berkaitan item 4, iaitu faedah yang dikenakan atas pinjaman dari syarikat pinjaman, mengambil kira bahawa responden telah menduduki hartanah tersebut secara percuma dalam tempoh material, maka tuntutan berkenaan harus ditukar-balas dengan manfaat-manfaat yang dikecapi responden tersebut.

[Gantirugi diturunkan dari RM208,587 ke RM172,673.]

Case(s) referred to:

Abdul Manaf Mohd Ghows & Ors v. Nusantara Timur Sdn Bhd [1977] 3 MLJ 661 (*refd*)

British Thomson-Houston Co Ltd v. Sterling Accessories, Ltd [1924] All ER Rep 294 (*refd*)

C Evans & Sons Ltd v. Spritebrand Ltd & Anor [1985] 2 All ER 415 (*refd*)
Dato' Seri Au Ba Chi v. Malayan United Finance Bhd & Anor [1989] 2 CLJ 801; [1989] 1 CLJ (Rep) 460 HC (*refd*)

Donoghue v. Stevenson [1932] AC 562 (*refd*)

Gran Gelato Ltd v. Rihcliff Ltd 2 All ER 865 (*refd*)

Griffiths v. Evans [1957] 2 QB 455 (*refd*)

Groom v. Crocker [1938] 2 All ER 394 (*refd*)

H

I

- A** *Hedley Byrne v. Heller* [1964] AC 465 (**refd**)
Midland Bank Trust Co Ltd & Anor v. Hett, Stubbs & Kemp [1978] 3 All ER 582 (**refd**)
Muoat v. Clark Boyce [1992] 2 NZLR 559 (**refd**)
Neogh Soo Oh & Ors v. G Rethinasamy [1983] 2 CLJ 218; [1983] CLJ (Rep) 663 HC (**refd**)
- B** *Panatron Pte Ltd v. Lee Cheow Lee* [2001] 3 SLR 405 (**refd**)
Performing Right Society Ltd v. CiryI Theatrical Syndicate Ltd [1924] 1 KB 1 (**refd**)
Rainham Chemical Works Ltd v. Belvdere Fish Guano Co Ltd [1921] All ER 48 (**refd**)
- C** *Ross v. Caunters* [1980] 1 Ch 297 (**refd**)
Salmon v. Salmon & Co [1895-1899] All ER Rep 33 (**refd**)
Thomas Bruce Morgan v. Government of Saskatchewan, Neal Hardy and Darrel Binkley [1985] Sask R 129 (**refd**)
Wah Tat Bank Ltd & Anor v. Chan Cheng Kum [1975] 2 All ER 257 (**refd**)
- D** *Wong Cheong Kai & Ors v. Hongkong Bank (M) Bhd & Anor* [2000] 4 CLJ 421 HC (**refd**)

Other source(s) referred to:

Halsbury's Laws of England, 3rd edn, vol 36, para 87

- E** *For the appellants - Norbert Yapp Chu Chon; M/s Jayasuriya Kah & Co*
For the respondent - Marina Tiu; M/s Yap Chin & Tiu
[Appeal from High Court Kota Kinabalu; Suit No: K263-1989]
- F** *Reported by Usha Thiagarajah*

JUDGMENT

G Arifin Zakaria JCA:

Background

- H** [1] This is an appeal by the 1st and 2nd appellants (the 3rd and 4th defendants in the court below) against the decision of the learned High Court Judge in allowing the plaintiff's claim. We dismissed the appeal, but we reduced the award of damages from RM208,587 to RM172,673. We now give our reasons for our decision.

I

The Undisputed Facts

A

[2] By a sale and purchase agreement dated 6 September 1985 (“the SPA”), the respondent/plaintiff agreed to purchase from the 1st defendant the property referred to as Ground Floor, Lot A, Wisma Shing Yin (“the subject property”) at the agreed price of RM170,000. The subject property is erected on the land comprised in the land title known as Country Lease No. 215328055 (“the said land”). At the time of the sale transaction, no subsidiary title had been issued in respect of the subject property.

B

C

[3] The respondent came to know about the subject property through an advertisement put up by the 1st defendant in a local newspaper. To finance the purchase, the respondent obtained a loan of RM102,000 from S Y Jie Credit Sdn Bhd (“the credit company”). A loan agreement was entered into on 6 September 1985 between the respondent and the credit company. The SPA and loan agreement together with the Memorandum of Charge in escrow were prepared by and executed in the office of the 2nd appellant legal firm. The legal fee in respect of the same and stamp duty, amounting to RM2,673 were paid by the respondent to the 2nd appellant. The respondent was given possession of the subject property on the date of the execution of the SPA.

D

E

[4] The 1st appellant was at all material times a registered shareholder (having 204000 shares), director and company secretary of the 1st defendant. He was also the company secretary of the credit company. The said land was charged to Sabah Bank Berhad under six memoranda of charges which were duly registered with the Land Office on various dates, both before and after the execution of the SPA. The said land, including the subject property, was subsequently foreclosed by Sabah Bank Berhad on 28 May 1993 and was sold to one Datin Rupiah bte Bachee Khan.

F

G

[5] The respondent brought this action claiming against the four defendants jointly and severally the sum of RM208,587 (which includes the purchase price and other expenses), damages, statutory interest and costs. The action against the 1st and 2nd defendants was not proceeded with as the 1st defendant company had since been deregistered while the 2nd defendant had passed away. At end of the hearing the learned judge allowed the respondent’s claim with interest and costs against the 1st and 2nd appellants.

H

I

A The Case Against The 1st Appellant

[6] The respondent claims that he was induced into purchasing the subject property on the representation contained in cl. 9 of the SPA which provides:

B Warranty of Good Title

C 9. The Developer hereby warrant that they have a good title to the said unit and that it is free from any trust, caveat, pending action, adverse possession and any other liabilities binding the same and hereby undertake to indemnify the Purchaser the fullest extent of any loss in the event of any breach of the warranty hereby given.

D [7] The claim against the 1st appellant is founded in tort for alleged fraudulent misrepresentation and/or conspiracy with the 2nd defendant to defraud or deceive the respondent. This is contained in para. 19 of the further amended statement of claim. In para. 6 of the same the respondent asserts that acting on the faith and truth of the said representations and warranties the respondent made and completed the SPA and paid the full purchase price of the subject property to the 1st defendant.

The Defence Of The 1st Appellant

F [8] The 1st appellant resisted the claim on the ground that as director of the 1st defendant, a limited company, he is not legally liable either in tort or contract for the act or omission on the part of the company, as the company, is a distinct legal entity from its shareholders or directors. In support counsel for the 1st appellant cited the celebrated case of *Salmon v. Salmon and Co.* [1895-1899] All ER Rep. 33. He further relied on the Court of Appeal's decision in *Abdul Manaf Mohd bin Ghows & Ors v. Nusantara Timur Sdn Bhd* [1977] 3 MLJ 661 which held that the fact that the agreement was executed by the second and third respondents in that case as directors of Nusantara Timur does not make them personally liable for the balance of the purchase price. The liability for such payment under the agreement is solely that of Nusantara Timur. The case of *British Thomson-Houston Co Ltd v. Sterling Accessories, Ltd.* [1924] All ER Rep. 294, was also cited in support of the defence. The learned judge disagreed with the 1st appellant on this point. Relying on *C. Evans & Sons Ltd v. Spritebrand Ltd and Anor.* [1985] 2 All ER 415 and *Rainham Chemical Works Ltd v. Belvedere Fish Guano Co. Ltd* [1921] All ER 48, he agreed with

the learned counsel for the respondent that a director may be held liable for tortuous acts of his company if the director has ordered or procured the commission of the acts complained of.

The Law

[9] In *C. Evans & Sons Ltd. v. Spritebrand Ltd and Anor.* Slade LJ relying on the case of *Performing Right Society Ltd v. Ciry l Theatrical Syndicate Ltd* [1924] 1 KB 1 stated the legal position in the following words:

The mere fact that a person is a director of a limited company does not by itself render him liable for torts committed by the company during the period of his directorship: see, for example, *Rainham Chemical Works Ltd (in liq) v. Belvedere Fish Guano Co Ltd* [1924] 2 AC 465 at 488, ... Nevertheless, judicial dicta of high authority are to be found in English decisions which suggest that a director is liable for those tortuous acts of his company which he has ordered or procured to be done.

[10] In *Wah Tat Bank Ltd and Another v. Chan Cheng Kum* [1975] 2 All ER 257, two banks brought an action against a shipping company and C, the company chairman and managing director, claiming damages jointly against them for conversion. In holding C liable the Privy Council in its judgment delivered by Lord Salmon stated:

No doubt the fact that the respondent is chairman and managing director of HSC does not of itself make him personally liable in respect of that company's tortuous acts. A tort may be committed through an officer or servant of a company without the chairman or managing director being in any way implicated. There are many such cases reported in the books. If however the chairman or managing director procures or directs the commission of the tort he may be personally liable for the tort and the damage flowing from it: *Performing Right Society Ltd v. Ciry l Theatrical Syndicate Ltd.* per Atkin LJ. Each case depends on its own particular facts. In the instant case the un-contradicted evidence proves that early in 1961 the respondent, as chairman and managing director of HSC, agreed with the directors of TSC the terms on which HSC would continue wrongfully to convert goods consigned to the banks just as they had done in the past. Their Lordships consider that in all the circumstances there is no answer to the banks' contention that the respondent was personally liable for the conversion in respect of which judgement has been entered against HSC.

A [11] It is pertinent to note that the Privy Council emphasized the point that each case will depend on its own particular facts.

[12] In *Thomas Bruce Morgan v. Government of Saskatchewan, Neal Hardy and Darrel Binkley* [1985] Sask. R. 129, the Saskatchewan
B Court of Appeal made the following observation:

On this branch of the case we refer to the following passage from judgment of Disber, J., in *Einhorn v. Westmount Investments Ltd. and Belzberg et al.* [1969], 69 WWR (N.S.) 31, at 36:

C Ordinarily an agent is subject to the control of another person, his principal. A company perforce is only able to act through its agents and servants. Consequently, while company directors are referred to as 'agent', the cold fact is that they control the company. As the directors pull the strings so the company must of necessity jump. Particularly
D is this true where, as here, the individual defendants were in 'complete control' of the company. This court in the exercise of its common-law jurisdiction in the field of tort considers the realities of the situations which come before it for decision, and the court is not restricted in so doing
E because individual carries out intentional tortuous acts through the medium of a puppet corporation whose every action they control. Individuals guilty of intentional tortuous acts do not escape personal liability by this device of clothing themselves in a corporate veil of their own spinning.

F [13] And further the court said:

So a director is not to be held liable merely because he is a director but may be liable when he participates in or orders a tortuous act and cannot escape personal liability by asserting that
G his act was merely the act of the corporation. In other words, the 'corporate veil' is not to be used as a shield to protect shareholders and directors when they have been guilty of wrongdoing. This approach is consistent with the notion that everyone should be answerable for his tortuous acts.

H [14] The issue before us is whether the 1st appellant here had authorized the commission of the fraudulent misrepresentation as contained in the SPA.

I

[15] Fraudulent misrepresentation comes under the tort of deceit. To succeed in his claim the respondent in this case need to establish that he had acted in reliance on the fraudulent misrepresentation and that the representation was false. He further needs to establish that the 1st appellant had made those statements knowingly or recklessly without caring whether it was true or false. And that as a result of reliance on such representation the respondent had suffered damage. For the elements of the tort of deceit see *Panatron Pte Ltd v. Lee Cheow Lee* [2001] 3 SLR 405.

[16] The learned judge having considered the facts in this case came to his finding that he was satisfied beyond reasonable doubt that the fraudulent misrepresentation could not have been committed by the 1st defendant without the authorization or consent of 1st appellant, who was not only the director and secretary of the 1st defendant but also holds a substantial shareholding in the 1st defendant company. We have carefully scrutinized the reasons given by the learned judge and we are satisfied that he was wholly justified in coming to the said conclusion. Firstly, it is not in dispute that the 1st appellant signed the SPA in his capacity as secretary and director of the 1st defendant. Even though in his testimony he claimed that he did not read the SPA before putting his signature to it, we agree with the learned judge that this is difficult to accept for the following reasons. The 1st appellant is an educated man. He works as the office manager of a law firm. In his evidence he said that as office manager of a law firm he is familiar with conveyancing procedure. So it is reasonable to assume that he must have read the fine letters of the SPA before putting his signature to it. Coupled with that is the fact that his own brother DW2, who was found by the learned judge to be the brain behind the scheme to attract potential purchasers for the said project, was the person responsible for the preparation of the SPA, which promised a clean title. In this regard we also need to take into account the fact that only two SPAs were executed in respect of the project. It is, therefore, highly unlikely in the circumstances for the representation contained the SPA to have escaped the attention of the 1st appellant. Thus from the evidence before the court we agree with the finding of the learned judge that the said fraudulent misrepresentation could not have found its way into the SPA without the approval of the 1st appellant.

- A [17] For the above reasons we are of the view that there is no merit in the appeal by the 1st appellant as regards liability. It is accordingly dismissed.

The Case Against The 2nd Appellant

- B [18] The 2nd appellant was a firm of solicitors who prepared the SPA and the loan agreement together with the memorandum of charge in escrow. It is not in dispute that these documents were executed in the office of the 2nd appellant and legal fees amounting to RM2,673 was paid by the respondent to the 2nd appellant for the SPA and the memorandum of charge. The respondent contends that the 2nd appellant was acting as solicitors for both the respondent and the 1st defendant in the sale and purchase transaction of the shop lot and the preparation of the relevant documentations. This is supported by cl. 6 of the SPA which refers to Messrs. Ronny Cham & Co as the “parties’ solicitor”, meaning that the 2nd appellant was the common solicitor for both the vendor and the purchaser. On that premise the respondent contends that the 2nd appellant as her solicitor owes her a duty to exercise proper skill, professional care and diligence in or about the said sale and purchase transaction. In particular it is alleged that the 2nd appellant failed to make proper searches on the title as to encumbrances and as regard the redemption of the relevant charges. In the alternative the respondent claims in negligence.

- F [19] It is settled law that a solicitor may be liable in contract in respect of any breach of contractual duty as a solicitor and in the alternative he may be held liable in tort for negligence, independent of contract as a professional man professing special skill who offer assistance to another and owed a duty of care to that other person who relied on his skill. (See *Neogh Soo Oh & Ors. v. G. Rethinasamy* [1984] 1 MLJ 126).

Liability In Contract

- H [20] On this issue the learned judge first asked the question whether in the first place the 2nd appellant was acting as solicitor of the respondent. After a detail analysis of the evidence before him the learned judge answered the question in the affirmative. In particular he relied on cl. 6 of the SPA which expressly provides that the transfer documents shall be kept by the parties’ solicitors Messrs. Ronny Cham & Co, the 2nd appellant herein.
- I

[21] Having considered the evidence before us and the arguments of parties it is our finding that the learned judge was justified in coming to his decision. Given cl. 6 of the SPA, we think it does not lie in the mouth of the 2nd appellant to say that it was only acting as solicitor for the 1st defendant and the credit company. Reading the said cl. 6 we are of the view that it is justified for the respondent to think that the 2nd appellant was in fact acting as her solicitor. It is true that there is no evidence in writing to support a retainer between the respondent and the 2nd appellant, but we agree with the learned judge that a retainer may be implied from the conducts of parties. (See *Halsbury's Laws of England*, 3rd edn, vol. 36 para. 87; *Dato' Seri Au Ba Chi v. Malayan United Finance Bhd & Anor.* [1989] 2 CLJ 801; [1989] 1 CLJ (Rep) 460; *Groom v. Crocker* [1938] 2 All ER 394.) In the circumstances of this case we agree that a retainer may reasonably be implied. We find the case of *Gran Gelato Ltd v. Rihcliff Ltd.* 2 All ER 865 and the local case of *Wong Cheong Kai & Ors v. Hongkong Bank (M) Bhd & Anor* [2000] 4 CLJ 421, cited to us by the learned counsel for the 2nd appellant, are distinguishable on the facts.

[22] The next issue is whether the 2nd appellant had committed any breach of duty as solicitor of the respondent.

[23] The scope of duty of a solicitor toward his client was spelt out in *Midland Bank Trust Co Ltd & Anor. v. Hett, Stubbs & Kemp* [1978] 3 All ER 582 at p. 583:

Now no doubt the duties owed by a solicitor to his client are high, in the sense that he holds himself out as practising a highly skilled and exacting profession, but I think that the court must beware of imposing on solicitors, or on professional men in other spheres, duties which go beyond the scope of what they are requested and undertake to do. It may be that a particularly meticulous and conscientious practitioner would, in his client's general interests, take it on himself to pursue a line of enquiry beyond the strict limits comprehended by his instructions. But that is not the test. The test is what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession, and cases such as *Duchess of Argyll v. Beuselinck*, *Griffiths v. Evans* and *Hall v. Meyrick* demonstrate that the duty is directly related to the confines of the retainer.

- A [24] In *Griffiths v. Evans* [1957] 2 QB 455 the Court of Appeal stated that the solicitor's duty to his client would very much depend on the retainer. Thus it was held by a majority (Denning LJ dissenting) that the solicitor in that case, being asked to advise specifically on compensation under the statutes, was not negligent
- B in not advising as to common law rights.

- C [25] Reverting to the present case, PW4, a solicitor, specializing in conveyancing, gave evidence that normally it is necessary to explain to the purchaser that he is only acting on behalf of the developer in order to avoid the impression that he is also acting for the purchaser having regard to the fact that normally it is the purchaser who pays the legal fees. He also testified that as a matter of practice he would conduct a search at the Central Land Registry on the status of the land in question, in particular to see
- D whether the land is encumbered or not. His evidence was not challenged by the 2nd appellant.

- E [26] It is the finding of the trial court that the 2nd appellant did not at all explain to the respondent that he was only acting as solicitor for the 1st defendant and the end financier, the credit company. The 2nd appellant further failed to inform the respondent that, contrary to what is stated in the SPA, the subject property was in fact encumbered with 5 charges. The learned judge further held that as solicitor for the end financier it is incumbent upon the 2nd appellant to carry out the standard redemption agreement with the existing chargees in order to protect the respondent's interest against the risk of losing the property in the event of foreclosure being brought by the chargees. This was not done. In this case the learned judge also
- F held that it is all the more compelling for the 2nd appellant to conduct the redemption procedure as the end financier and the developer are owned by one and the same person. This is to avoid any possible collusion between the end financier and the developer. Given the fact that the 2nd appellant was acting as solicitor for both the vendor and the end financier on the one
- G hand and the purchaser on the other, we agree with the observation of the learned judge that the standard of care required of the 2nd appellant is, in the circumstances, indeed high. (See *Muoat v. Clark Boyce* [1992] 2 NZLR 559.)

I

[27] Having considered the matter we came to the conclusion that the learned trial judge had rightly come to his finding that in the circumstances the 2nd appellant had been in breach of his duty as solicitor of the respondent under the implied retainer.

A

Liability In Negligence

B

[28] Apart from his liability under the retainer the learned judge in the alternative found the 2nd appellant liable to the respondent in tort on the principle in *Hedley Byrne v. Heller* [1964] AC 465. He held that the 2nd appellant is liable in negligence to the respondent in making the wrongful representation in the SPA, that the subject property was free from any encumbrance, which was not true. Had it not been for this representation the respondent would not have proceeded with the purchase of the subject property at all. By giving the wrong representation in the SPA, the 2nd appellant had thereby induced the respondent to act to his detriment.

C

D

[29] The learned judge further held the 2nd appellant is liable in tort on the direct application of the neighbour principle in *Donoghue v. Stevenson* [1932] AC 562. In *Ross v. Caunters* [1980] 1 Ch. 297 Megarry J held that “a solicitor who is instructed by his client to carry out a transaction that will confer a benefit on an identifiable third party owes a duty of care towards that third party in carrying out that transaction”. In the present case we agree with the learned judge that the 2nd appellant in failing to secure the redemption agreement on behalf of the end financier would expose the respondent to the risk of losing the subject property in the event of a foreclosure being taken by the chargee, as had happened here. Further, PW4, in his testimony stated that it is a standard conveyancing practice for solicitor acting for end financier to enter into redemption agreement with the chargee in order to protect the interest of the end financier. The 2nd appellant failed to do just that. This had caused resultant loss on the respondent. On the evidence before us, we hold there is sufficient proximity between the 2nd appellant and the respondent as to render the 2nd appellant liable to the respondent for his omission to take the necessary measure to secure the redemption agreement from the chargee.

E

F

G

H

[30] For the above reasons we upheld the decision of the learned judge on the issue of liability as against the 2nd appellant.

I

A **Damages**

[31] The respondent claims damages in the sum of RM208,587 as particularized in para. 25 of the further amended statement of claim which are reproduced below:

B	Particulars	
	1. Total purchase price paid in respect of the Shophouse unit to the 1st Defendants	RM170,000.00
C	2. Legal fees incurred in respect of the sale and purchase and loan transaction	RM 2,673.00
	3. Legal fees and disbursements for lodging and renewal of Caveat in respect of the said property	RM 690.00
D	balance carried forward	----- RM173,363.00
	4. Interest incurred in respect of the loan taken for the purchase of the said Shophouse unit	RM 34,712.00
E	5. Premium for Insurance paid in respect of the said Shophouse unit (1987 – 1988)	RM 512.00 -----
F	Total	RM208,587.00

[32] The learned judge allowed the whole sum as claimed. The learned counsel for the respondent admitted that no documentary evidence was tendered in support of items 3 and 5 but contended that as for item 4 this is supported by the “Memorandum of An Agreement For A Loan” at p 198 of Part C of the Record of Appeal. We allowed the appeal as regard items 3, 4 and 5 for the following reasons. As for items 3 and 5, we disallowed these items since, as conceded by learned counsel for the respondent, no documentary evidence was tendered in support of the same. On that premise the award under these items could not stand. With regard to item 4, that is interest incurred in respect of the loan from the credit company, we are satisfied that they must have been incurred by the respondent, but taking into account the fact that the respondent had occupied the subject property rent free during the relevant period, we hold that this item should rightly be set off against the said benefit. For that reason we disallowed item 4.

The Result**A**

[33] In the result we dismissed the appeals herein as regard liability, but we allowed partially the appeals with regard to quantum as indicated above. We awarded costs to the respondent, but as the appellants had succeeded partially in their appeals on the quantum, we ordered that the appellants be given a reduction of 15% of the taxed costs.

B

[34] Deposit to be paid out to the respondent towards account of taxed costs.

C

[35] My learned brother Tengku Baharudin Shah bin Tengku Mahmud, JCA has seen this judgment in draft and has expressed his agreement with the draft. However, my learned brother Haji Abdul Kadir bin Sulaiman, JCA has since retired and as such we do not have the benefit of his view on the draft.

D

E**F****G****H****I**